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No. 319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, MALCOLM WILSON, Lieutenant Governor of the State of New York, and ANSLEY BORKOWSKI, Clerk of the Assembly of the Legislature of the State of New York,

Appellants,

v.

JEROME T. ORANS, THE VILLAGE INDEPENDENT DEMOCRATS, CAROL GREITZER, EDWARD I. KOCH, MARTIN BERGER and LORRAINE RICHMAN,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

JUSTIN N. FELDMAN,
777 Third Avenue,
New York, New York 10017,
Attorney for Appellee Orans.

GEORGE M. COHEN,
RICHARD W. HULBERT,
52 Wall Street,
New York, New York 10005,
Of Counsel.

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JEROME T. ORANS, *et al.*,

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Appellee Orans hereby moves, pursuant to Rule 16 of the Revised Rules of this Court, that the appeal herein taken be dismissed on the ground that it does not present a substantial federal question.

Statement

This is an appeal from a judgment of the New York Court of Appeals, entered April 28, 1965 (R. 933-936)*, affirming an order and judgment of the Supreme Court of New York, New York County, entered March 24, 1965

* Numbers preceded by "R." in this motion refer to pages of the Record on Appeal as filed with this Court.

(R. 906-920), holding invalid on state constitutional grounds apportionment legislation enacted at a special session of the New York Legislature held in December, 1964. The decision here appealed from held the legislation invalid because it provided for an Assembly of more than the 150 members established for that body by Article III, Section 2 of the New York Constitution.

The legislation in question (the so-called Reapportionment Compliance Act) consisted of four separate plans of apportionment of the New York Senate and Assembly, commonly referred to as Plans A, B, C and D. Plans A and C were based on citizen population, the traditional standard provided by the New York Constitution, whereas Plans B and D were based on the vote cast in the 1962 gubernatorial election. Plans A and B provided for single member constituencies in both houses, with each member casting one vote. Plans C and D provided for single member constituencies, but a number of members of the Assembly were awarded fractional votes. None of the four plans provided for 150 Assemblymen: Plan A called for 165, Plan B for 180, Plan C for 186, and Plan D for 174.

After enactment of the legislation, the apportionment plans were presented to the Federal District Court for the Southern District of New York. Pending the hearing of various motions with regard to the legislation, this proceeding, confined to questions arising under the State Constitution, was commenced in the State Court. The Federal District Court declined to enjoin this proceeding, although requested to do so, and declined also to rule on any state constitutional questions as to any of the four plans. Confining itself to federal constitutional questions, the Federal Court by orders of January 26 and February 16, 1965, and in an opinion dated February 1, 1965 (238 F. Supp. 916), held Plans B, C and D unconstitutional, but

sustained Plan A. Cross appeals from that decision are pending in this Court. *Lomenzo* v. *WMCA, Inc.*, October Term, 1964, No. 85; *WMCA, Inc.* v. *Lomenzo*, October Term, 1964, No. 1104.

Inasmuch as Plans B, C and D had been held invalid on federal constitutional grounds, the parties to this proceeding stipulated that the hearing in the State Court as to the facts should be confined to Plan A, but that legal questions common to the four plans would be presented and considered. By a decision dated March 15, 1965 (*In re Orans' Petition*, 45 Misc. 2d 616, 257 N. Y. S. 2d 839) and an order and judgment entered March 24, 1965, the State Supreme Court held all four plans invalid for failure to comply with the requirement of Article III, Section 2 of the New York Constitution fixing Assembly membership at 150. The Supreme Court found further, on the documentary evidence presented to it, that the petitioner had made out a *prima facie* case for the invalidity of Plan A on a number of additional grounds under Article III, Sections 4 and 5 of the New York Constitution (printed at pages 30a-36a of the appendices, hereafter cited as "App.", to the Appellants' Jurisdictional Statement). However, in view of its determination as a matter of law that the legislation was invalid for failure to comply with the requirement of a 150-member Assembly, the Court deferred further proceedings on those issues until the need therefor should appear. The Court in its Order and Judgment held that such *prima facie* showing of invalidity had been made

(a) as to 51 of 65 Senate Districts and 83 of 165 Assembly Districts, for failure to achieve sufficiently equal population (Order and Judgment, pars. 5 and 6, R. 913-915)*;

* In *Matter of Dowling*, 219 N. Y. 44 (1916), the apportionment of 1916 was held unconstitutional for violation of this provision.

(b) as to 8 Senate districts and 11 Assembly districts, for violation of the integrity of town boundaries (Order and Judgment, pars. 7 and 8, R. 915, 916)*;

(c) as to 13 Senate districts and 16 Assembly districts, for failure to comply with requirements that districts be compact and composed of contiguous territory, and, in the case of Assembly districts, composed also of convenient territory (Order and Judgment, pars. 9 and 10, R. 917)**;

(d) as to an unspecified number of districts, for failure to respect the integrity of county boundaries beyond any occasion to depart from them by a need to comply with the equal population standards of the Fourteenth Amendment (Order and Judgment, par. 11, R. 918)***; and

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* This provision was applied in *Matter of Tishman* v. *Sprague*, 293 N. Y. 42 (1944), to invalidate an apportionment of Assemblymen in Nassau County.

** In *Matter of Sherrill* v. *O'Brien*, 188 N. Y. 185 (1907), the apportionment of 1906 was held unconstitutional, in part on this ground.

*** This judicial finding, on extensive documentary evidence, stands in clear conflict with the unsupported assertion of the appellants that the legislation in question enlarged the number of Assemblymen from 150 to 165 "to achieve separate county representation, consistent with the one-man, one vote principle and the purpose of keeping the Assembly within a manageable size" (Juris. State. 14).

Moreover, on the mathematics of the question, the appellants' contention is unfounded. The effect of the increase in the number of Assemblymen from 150 to 165 was to reduce the average citizen population per Assemblymen from 108,272 to 98,429. However, since 22 of New York's 62 counties had a 1960 citizen population of less than 50,000, and another nine counties had a population in the range of 50,000 to 70,000, the slight reduction in average population per member resulting from the increase in the number of members had substantially no significance in terms of preserving separate representation for the many sparsely populated counties. The foregoing population data appear at pages 36-37 of the Supplemental Report of the Joint Legislative Committee on Reapportionment, Legis. Doc. (1964) No. 76-A, Respondents' Exhibit C.

(e) as to an unspecified number of districts, for failure to respect state constitutional prohibitions against gerrymandering, which the Court summarized as forbidding "any system of legislative apportionment and districting which is arbitrary and based on personal and political considerations and not on the convenience of the voters or any factor relating to the public interest, and with the purpose of assuring the continuous election of the candidates of one particular party and the control of legislative districts by particular political leaders" (Order and Judgment, par. 12, R. 918, 919)*.

The respondents below (appellants here) appealed from the Order and Judgment of the State Supreme Court directly to the Court of Appeals, which in a decision of April 14, 1965, affirmed the determination of the Supreme Court that the legislation was invalid, but confined its holding to the issue finally determined below, the violation of the requirement of a 150-member Assembly.

The Questions Raised Are Insubstantial

The appellants' contention that the Equal Protection Clause of the Fourteenth Amendment is violated by the provision of the New York Constitution (Article III, Section 2; App. 29a-30a) which requires that the New York Assembly "shall consist of one hundred and fifty members" is plainly frivolous. No particular number of legislators is incapable of being "apportioned on a population basis" (*Reynolds* v. *Sims*, 377 U. S. 533, 568 [1964]),

* The leading authority on this point is *Matter of Richardson*, 307 N. Y. 269 (1954), involving litigation over the 1953 apportionment. The apportionment was sustained by a divided court, but both the majority and the minority agreed that the state constitution proscribed gerrymandering; they disagreed as to whether the plaintiff's evidence was sufficient to show it as a fact.

and, equally clearly, no particular number of legislators is incapable of being apportioned with the grossest discrimination. In short, no particular number of members of a state legislature can be regarded as either required or prohibited, as a matter of the Federal Constitution. This Court has explicitly recognized as much.

> "Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums in the size of state legislative bodies." (*Reynolds* v. *Sims*, *supra* at 581, footnote 63)

Since 1894 the New York Constitution has fixed the number of members of the Assembly at 150.* Both reason and the pronouncement of this Court in *Reynolds* just quoted sustain the correctness of the determination of the New York courts in this case that the 150-member requirement continues as a valid provision of the New York Constitution, in no way in conflict with the Federal Constitution.

What has been said really disposes of the "substantial questions" which the appellants contend are raised on this appeal. The appellants, however, seek to impart a factitious substance to the issue by asserting that this Court in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964), held that the New York constitutional requirement of a 150-member Assembly was itself an ingredient of the "scheme of apportionment" there found unconstitutional. The appellants would have it that this Court acted in defiance of the

* As the Court of Appeals noted in its opinion (App. 14a), the New York Constitution since 1777 has contained provisions fixing the number of members of the Assembly. The question has never been left as a matter of legislative discretion.

obvious (that any number of legislators can be fairly apportioned) and in flat contradiction to its clear statement in *Reynolds* (that in recognition of the obvious, there are no federal constitutional maxima or minima as to the numbers of a state legislative body). Little enough needs to be said to show that this aspect of the question presented is wholly unsubstantial.

The appellants rely on one clause in the opinion of this Court as showing that the requirement of a 150-man Assembly is unconstitutional.

> "With the size of the Assembly fixed at 150, with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population * * * the population-variance ratios between the more populous and less populous counties will continually increase so long as population growth proceeds at a disparate rate in various parts of the State." (377 U. S. at 654)

What this Court was considering was the effect of the scheme of apportionment embodied in the New York Constitution. The inquiry was of course pragmatic. What this Court held was that, taking the facts as they were, including the facts of population concentration and certain other conditions affecting the result obtained when the scheme was given effect, one of those conditions being a fixed number of Assemblymen, the result was one which could not be said to constitute an apportionment "on a population basis." This Court no more condemned the fixed number of 150 Assemblymen than it condemned the "disparate rate" of population growth in various parts of New York. To assert otherwise, as the appellants do, is to indulge in word play.

Even if one were to accept *arguendo* the contention of the appellants that this Court's decision in the *WMCA*

case held the 150-member requirement to be a part of the unconstitutional scheme of apportionment, it does not follow that the requirement cannot continue to be respected consistently with the Federal Constitution. Given that this Court's conclusion as to the New York scheme of apportionment was an appraisal of the total effect of the scheme, it is clearly left for the State to determine which elements of its Constitution, under its own rules of severability, may continue to be given effect, provided only that the result is not inconsistent with the Federal Constitution. Whether individual elements of the scheme, shorn of their association with other elements, may continue to be given effect as a matter of state law would present a federal constitutional question only if the new result were an apportionment inconsistent with the Fourteenth Amendment standard enunciated by this Court. Inasmuch as an Assembly of 150 members can clearly be apportioned on a basis consistent with the command of the Equal Protection Clause, it is a question of state law, not a federal question, as to whether that requirement continues to be applicable.

Acceptance of appellants' contrary contention (Juris. State. 12) would mock the views of this Court expressed in several of the apportionment decisions. Thus, in *Reynolds, supra* at 584, this Court said that "Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible." Thus, in the same opinion this Court held clearly proper state efforts to "maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme" (*Ibid.*, at 578). These and other expressions of similar purport have no meaning

if, as the appellants contend, a state legislature is freed by federal constitutional requirements from the applicability of any state constitutional provisions as to apportionment.

The appellants, lastly, raise in rather opaque form what appears to be the contention that the Federal Constitution prohibits judicial review in the New York State Courts of any legislation which the New York Legislature may adopt in a supposed attempt to deal with the situation produced by a determination that an existing scheme of state apportionment is unconstitutional (Juris. State 13 and following)*. The appellants seize on passages in opinions of this Court which describe "legislative reapportionment [as] primarily a matter for legislative consideration and determination," (Juris. State. at 13, quoting from *Reynolds* v. *Sims, supra* at 586), and, in the Maryland case, suggesting that "the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions which comport with federal constitutional requirements" (*Ibid,* quoting from *Maryland Committee* v. *Tawes,* 377 U. S. 656, at 675-76).

Nothing done in New York is in conflict with these comments. Apportionment is "primarily" a legislative matter in New York (see Article III, Section 4 of the New York

* The appellants, indeed, appear to claim that the *Legislature* would have been free to enact a new apportionment providing for the same 150 Assemblymen which they condemn when imposed by the *State Courts*. This appears not only from the appellants' contentions of legislative supremacy in the apportionment process, but also from their necessary contention that no provision of the Federal Constitution precluded the choice of 165 (or 174, 180 or 186) members of the Assembly, as the plans variously provided. It can hardly be supposed that the appellants seriously press an argument that any number other than 150 would be unquestionably permissible, and that only 150 has been condemned by this Court's decision in *WMCA* v. *Lomenzo, supra.*

Constitution, App. 30a-32a, providing for legislative reapportionment decennially). The New York Court of Appeals in this very case, over the thoughtful dissent on this point of Judge Bergan, held that the legislature had the power to enact temporary apportionment legislation (App. 10a and following; Judge Bergan's opinion is printed at App. 15a-17a). What the New York courts declined to recognize as valid was not legislative power to deal with apportionment on a temporary basis, but an exercise of that power in terms flatly inconsistent with provisions of the New York Constitution which in no way conflict with the Federal Constitution.

The question which the appellants raise is the question of which organ of the state government possesses the ultimate power of decision as to whether these state constitutional provisions continue to be applicable. However, this is not a question involving the Federal Constitution, but a question of the allocation of power among the branches of the state government. Article III, Section 5 of the New York Constitution (App. 36a), the validity of which is not in question, confers upon the New York courts the power to review apportionment legislation, and of necessity therefore confers upon them the power to construe the State's constitutional apportionment provisions. Whether this grant of power to the New York courts is wise or unwise, efficient or inefficient or otherwise subject to criticism or applause, is not a federal question and certainly not a substantial federal question.

CONCLUSION

The appeal should be dismissed for want of any substantial federal question.

Respectfully submitted,

JUSTIN N. FELDMAN,
777 Third Avenue,
New York, New York 10017,
Attorney for Appellee
Jerome T. Orans.

GEORGE M. COHEN,
RICHARD W. HULBERT,
52 Wall Street,
New York, New York 10005,
Of Counsel.

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